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In the Supreme Court

OF THE

United States

Supreme Court, U.S.
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GARY E. CALKINS and ANNA ROSA CALKINS
d/b/a INDIO GROCERY OUTLET,
Petitioners,
VS.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

INTRODUCTORY STATEMENT

Petitioners Gary E. and Anna Rosa Calkins dba Indio Grocery Outlet ("Petitioners") hereby file their reply brief in support of their Petition for Writ of Certiorari ("Petition") filed with this Court on February 14, 2000. The Petition was placed on the docket on February 26, 2000, and seeks review of the decision of the United States Court of Appeal for the Ninth Circuit, which affirmed a decision of the National Labor Relations Board ("the Board") allowing handbilling and picketing by non-employees on behalf of a union on the private property of a free-standing grocery store operated by Petitioners and located in Indio, California.

The Petition argues that the Ninth Circuit wrongly construed California law as allowing the handbilling and picketing at issue. The Petition argues that the Ninth Circuit, in ruling on the case, disregarded established California precedent by failing to consider a recent California Court of Appeal ruling, *Trader Joe's v. Progressive Campaigns, Inc.*, 73 Cal.App.4th 425 (1999), issued after briefing and oral argument to the Ninth Circuit were complete but before the decision was issued. *Trader Joe's* held that California's access rights for petition signature gathering do not extend to a free-standing grocery store. *Id.* at 433. Despite Petitioners' calling the Ninth Circuit's attention to the *Trader Joe's* case by way of a petition for reconsideration ("Reconsideration Petition"), the Ninth Circuit denied the Reconsideration Petition without comment. Petitioners requested the Ninth Circuit, in the Reconsideration Petition, to certify the question at issue to the California Supreme Court, through rules established for that purpose in 1998. Petitioners requested this court to certify the issue to the California Supreme Court in the Petition.

Petitioners made the request because of (1) the age and questionable value of the precedents relied on by the Board and the Ninth Circuit in reaching their conclusions, and (2) because all the California Court of Appeal decisions since *Robins* have refused to extend it beyond regional shopping centers. Both petitions cited to a case, *Los Angeles Alliance for Survival v. City of Los Angeles,* 157 F.3d 1162 (1999) (hereinafter *"Alliance for Survival I"*), wherein the Ninth Circuit had certified another issue to the California Supreme Court involving the scope of California's state constitutional free speech protections.[1]

After the filing of the Petition, the California Supreme Court issued its decision in *Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th 352; 93 Cal.Rptr.2d 1 (2000) on March 2, 2000 (hereinafter *"Alliance for Survival II"*). In that case, the California Supreme Court adopted a more restrictive view of Article I, Section 2 than was adopted by the Ninth Circuit (although in *Alliance for Survival* the provision was discussed in the context of a law criminalizing "aggressive solicitation"). Before ruling on the merits of the certified question, the California Supreme Court extolled the benefits of the certification procedure. Respondent's arguments exaggerate the strength of the precedents that predate *Robins v. PruneYard Shopping Center,* 23 Cal.3d 899 (1979), while attempting to minimize the holdings and analysis of more recent cases, which show that California's courts have limited *Robins* to large shopping centers. The two main cases relied upon by the Ninth Circuit below, *In re Lane,* 71 Cal.2d 872 (1969), and *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union,* 61 Cal.2d 766 (1964), do not

[1] Article 1, Section 2 of the California Constitution states in part: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

follow the balancing test enunciated in *Robins,* which was decided long after those cases. Recent cases involving access issues have severely limited those pre-Robins cases. The Court should grant the Petition.

II.

THE COURT SHOULD GRANT THE WRIT AND CERTIFY THE ISSUE TO THE CALIFORNIA SUPREME COURT

California Rule of Court Rule 29.5, adopted in 1998, allows the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory or commonwealth, to certify potentially determinative questions of California law to the California Supreme Court.

In its first opinion based on a certified question, in *Alliance For Survival II, supra,* the California Supreme Court identified several benefits of the procedure. The Court stated that certification: "(i) allows federal courts to avoid mischaracterizing state law (thereby avoiding a misstatement that might produce an injustice in the particular case and potentially mislead other federal and state courts until the state supreme court finally, in other litigation, corrects the error); (ii) strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to conclusively decide an issue; (iii) avoids conflicts between federal and state courts, and forestalls needless litigation; and (iv) protects the sovereignty of state courts." *Alliance for Survival II,* 22 Cal.4th 352, 360-361; 93 Cal.Rptr.1, 5 (2000) (citations omitted).

The California Supreme Court also stated that allowing federal courts to rule regarding state law issues creates a perverse incentive. If the Ninth Circuit has ruled favorably on the interpretation of a particular aspect of California law,

the party favoring that ruling has incentive to file litigation in federal court (by joining a state law claim with a federal constitutional claim), because the California Court of Appeal is not bound by the interpretation of California law as predicted or inferred by a federal court. However, federal district courts are bound by a decision of the Ninth Circuit. In a situation such as this, the certification procedure "provides that most expeditious, and, as a practical matter, perhaps the only effective, means to enable California, through the courts, to exercise the state's authority over the proper interpretation and application of article I, section 2(a) of its own Constitution." *Id.* at 361, 93 Cal.Rptr. at 6.

This Court has also repeatedly endorsed certification as an important part of federalism. "Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.' " *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 1073 (1997) (quoting *Lehman Brothers v. Schein,* 416 U.S. 386, 391, 94 S.Ct. 1741, 1744 (1974)).

In ruling on requests for certification by parties, courts of appeal have looked at several factors, including whether the question at issue is dispositive of the case (clearly applicable here), and whether the state law in question is unclear or in conflict on the subject. See *Alliance for Survival I, supra,* 157 F.3d 1162, 1165 (noting that certification of issue is proper because California Court of Appeal cases present conflicting views). Here, as discussed below, the older cases relied on by the Ninth Circuit are questionable precedent and conflict with all of the more recent cases involving properties which are not large shopping centers, in which courts have found no right of access. Therefore, certification is proper. Other arguments against certification which are

routinely presented (delay, crowding of court dockets, etc.) are similarly without merit. *See* Braun, *A Certification Rule for California,* 36 Santa Clara L.Rev. 935, 942-945 (1996); Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law,"* 41 Wayne L.Rev. 273, 294-298 (1995).

The case for certification is especially strong here, for the reasons discussed above, and because the large body of law regarding access cases in California shows that these access cases recur frequently.

California Courts of Appeal have in fact rejected access claims to private property near grocery stores (*Trader Joe's, supra*), banks (*Bank of Stockton v. Church of Soldiers,* 44 Cal.App.4th 1623, 1628-1629; 42 Cal.Rptr.2d 429 (1996), apartment buildings (*Golden Gateway Center v. Golden Gateway Tenants Association,* 87 Cal.Rptr.2d 22 (*review granted* November 23, 1999) and medical clinics (*Feminist Women's Health Center v. Blythe,* 32 Cal.App.4th 1641, 1660-1661 (1995), and cases cited therein). In *Judlo, Inc. v. The Vons Cos., 211 Cal.App.3d 1020;* 259 Cal.Rptr. 624 (1989), the Court of Appeal reversed a trial court's injunction requiring a grocery store owner to allow placement of newsracks on private property outside the store. The Court of Appeal agreed with Vons that its grocery store, unlike the shopping center in *Robins,* was not "the functional equivalent of a municipality" and therefore did not have to provide such access. *Id.* at 1027-1028.

Trader Joe's strongly rejected the dicta in *Bank of Stockton* which stated that *Robins* applied to large, supermarket-type grocery stores, in holding that an 11,000 square foot grocery store was not available as a public forum under *Robins,* and that the size of the store in question was not a determinative factor, and that the analysis should properly focus on the degree to which the particular property is open

to the public and the societal interest in having that forum for expressive activity.

California trial courts have also repeatedly ruled that property outside of stand-alone grocery stores, regardless of size, are not subject to access.[2] Cases outside of California, in states that have adopted *Robins* to at least some extent have also limited access rights to large shopping centers, while rejecting claims of access to free-standing stores.[3]

The cases relied on by the Ninth Circuit are between twenty-one and thirty-six years old, and are of questionable value as precedent. The first decision relied on by the Ninth Circuit, *Lane, supra,* was decided when federal law guaran-

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[2] *Busch v. Ralphs,* Los Angeles County Superior Court Case No. SC 051874 (summary judgment granted April 9, 1999, in favor of grocery store owner against persons soliciting petition signatures), *Waremart, Inc. v. Discovery Petition Management,* Butte County Superior Court Case No. 121900 (summary judgment granted September 15, 1999, for retailer of groceries and related items against persons soliciting petition signatures), *Young v. Raley's, Inc.,* Yolo County Superior Court Case No. V97-00076 (judgment after trial in favor of stand-alone grocery store owner against petition signature gatherers on or about May 11, 1999). Counsel for petitioners in this matter also represents Ralphs in the pending appeal of that matter. It is unknown whether either of the other cases cited in this footnote have been appealed.

[3] *Waremart v. Progressive Campaigns, Inc.,* 139 Wash.2d 623, 989 P.2d 524, 530 (1999), (No access to solicit signatures outside of 80,000-square foot grocery store located in a strip mall because store is not the "equivalent of a 'town square,' 'community business block,' or other public forum."); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.,* 138 N.J. 326, 373 (1994) ("No highway, no strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center sufficiently . . . warrant[s] the constitutional extension of free speech to those premises, and we so hold."); *Wabban, Inc. v. Brookhart,* 142 Ore.App. 261 (1996) (no right of access for leafletters at two large stand-alone Home Base stores; court held that Home Base parking lots were not equivalent of town square).

teed access to shopping centers under the First Amendment, and predates by ten years the California Supreme Court's decision in *Robins, supra,* wherein the Supreme Court created a right of access to certain enclosed shopping centers under the California Constitution and created the balancing test applied by the Court of Appeal in *Trader Joe's. Trader Joe's* states that "[t]he [*Robins v.*] Pruneyard court's reference to *Lane* was brief and collateral; the court did not expressly or implicitly hold that our state constitution protects free speech and petitioning rights at privately owned stand-alone grocery stores. Indeed, as already noted, no published decision in this state contains such a holding." *Trader Joe's, supra,* at 436, 86 Cal.Rptr.2d at 450. The Attorney General of the State of California, in a 1990 opinion regarding access rights to parking lots of abortion clinics, rejected the idea that the *Robins* court had endorsed the holding in *Lane.* "It is not clear what the *Robins* court meant when it said that the usefulness of *Lane* as precedent was not diminished by the overruling of the *Logan Valley* case. It might be argued that it suggests that the rights announced in *Lane* would survive in California as part of the [California constitutional freedom of speech]. *We reject this argument because it flies in the face of the express language in the Robins opinion that it does not apply to "the proprietor of a modest retail establishment."* 73 Ops.Atty.Gen. 213, 217-218 (1990) (emphasis added).

Schwartz-Torrance, supra, predates *Robins* by fifteen years, was decided when federal law allowed access to shopping centers, and is bereft of any discussion of a balancing test such as was applied by the Court in *Robins.* In *Union of Needletrades, Industrial & Textile Employees, AFL-CIO v. Superior Court (Taubman Co.),* 56 Cal.App.4th 996, 65 Cal.Rptr.2d 838 (1997) (hereinafter *"UNITE"*), the Court of Appeal stated that "*Schwartz* is of dubious value for the proposition cited given that it predates *[Robins v.] Pruneyard* (sic) by 15 years and *Pruneyard*

(sic) is the linchpin of the claim that there is a state constitutional right." The Court of Appeal also rejected the argument by UNITE that citations of *Schwartz* by the *Robins* court represented an endorsement of the holding in *Schwartz:* "Those citations were simply for the proposition that the property rights of the shopping centers were not absolute but were subject to a balancing process in determining the right to access." *UNITE, supra,* at 1012.

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 25 Cal.3d 317 (1979), another case relied on by the Board and the Ninth Circuit, the California Supreme Court expressly stated that it was deciding the case on statutory grounds and that it "express[ed] no opinion on whether the California Constitution protects the picketing here at issue." *Id.* at 327, fn. 5. Therefore, that case cannot be used as precedent.

III.

THE COURT SHOULD GRANT THE PETITION EVEN IF IT DOES NOT CERTIFY THE QUESTION TO THE CALIFORNIA SUPREME COURT

Even if the Court does not grant the Petition and certify the question of whether California law grants non-employees rights to picket and handbill at a free-standing grocery store, the Court should nevertheless grant the Petition and reverse the decision of the Ninth Circuit with regard to California law on this issue, because the more recent cases decided by state courts limiting access rights outside the context of large shopping malls are more persuasive than the older cases, which are inconsistent with the analytical framework of *Robins.* Because these arguments are addressed in Section II above, they will not be restated here.

Respondent argues that this Court need not consider *Trader Joe's* because it was not raised prior to the Reconsid-

eration Petition. Respondent concedes that *Trader Joe's* was decided well after completion of briefing and oral argument, and approximately one month before issuance of the decision by the Ninth Circuit. Nevertheless, Respondent argues that Petitioners should not be able to argue that *Trader Joe's* should be considered, because Petitioners had an approximate one month window to raise *Trader Joe's* to the Ninth Circuit by supplemental brief. However, the authorities cited by Respondent are inapposite. In *United States v. Sutherland,* 428 F.2d 1152, 1158 (5th Cir. 1970), the court held that a party could not present a different theory on a motion for reconsideration than was presented on appeal, where the legal basis for the new *theory* (a federal statute passed in 1968) existed before the appeal was decided in April 1970. Here, the petition for reconsideration did not present a different legal theory, but rather pointed to a new decision in support of an existing theory. Second, unlike the 1968 statute, *Trader Joe's* could not have been presented to the Ninth Circuit until about one month before the decision was issued (assuming counsel for Petitioners had instantaneous knowledge of the *Trader Joe's* opinion and the ability to instantly draft a supplemental brief on the issues raised by the opinion).

With regard to Respondent's contention that the Ninth Circuit has not passed on the applicability of *Trader Joe's,* the denial of the petition for reconsideration certainly qualifies as passing on that claim, absent some statement from the Ninth Circuit that it did not consider the merits of the Reconsideration Petition due to some procedural defect.

Respondent's contention that Petitioners seek review of a pure state law issue is misleading. This Court has repeatedly held that a conflict between the decision of a federal court of appeal and either the state's highest court or state intermediate courts of appeal is an appropriate basis for review. See *Six Companies v. Highway District,* 311 U.S. 180 (1940);

West v. American T & T Co., 311 U.S. 223 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940).

Contrary to Respondent's arguments concerning the validity of the precedent established in *In re Lane*, Petitioners clearly distinguished *Lane* both in this reply brief and in the original petition. Petitioners have also clearly established that the references to the holding in *Lane* by the Court of Appeal in *Bank of Stockton* was dicta. Respondent's argument (Respondent's Brief, page 12, fn. 5) that the Court of Appeal necessarily had to conclude that the Bank was not a grocery store in order to determine that the bank qualified as a "modest retail establishment" under *Robins* flies in the face of logic. Further, as discussed above, the argument that *Robins* stands for the proposition that there is no access to "modest retail establishments" and allows access to larger retail establishments is a red herring. The balancing test enunciated in *Robins* and discussed at length in *Trader Joe's* is used to balance competing rights, a more complex analysis than merely labeling a particular establishment as being "modest" or not.

IV.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 10, 2000 Respectfully submitted,

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